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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1570

BALLY CASE AND COOLER, INC., OF DELAWARE,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

LOCAL 2130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND REQUEST FOR VACATION OF JUDGMENT AND REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR FURTHER CONSIDERATION AND APPENDIX

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Petitioner, BALLY CASE AND COOLER, INC., petitions for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered in this case on the 17th day of October 1969, enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The Decision of the Trial Examiner appears at page 184a of the Joint Appendix. The Board's Decision and Order rejecting the Trial Examiner's opinion appears at page 202a of the Joint Appendix. The opinion by the United States Court of Appeals for the Sixth Circuit upholding the ruling of the National Labor Relations Board was filed October 17, 1969, and is appended hereto.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered October 17, 1969, is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board and the United States Court of Appeals can by indirection, order a party to agree to a substantive provision of a collective bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended (29 U.S.C. Section 151, et seq.) are set forth in the Appendix.

STATEMENT OF THE CASE

The National Labor Relations Board found the Petitioner to be in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act as amended "by refusing to bargain in good faith with the duly certified bargaining agent of its employees at its plant in Bally,

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Pennsylvania. Consequently, we [the Board] shall order the Respondent to bargain upon request with the union and to cease and desist from any like or related unfair labor practices in the future." (JA 207a)*

The United States Court of Appeals for the Sixth Circuit ordered enforcement of the Board's cross-petition affirming the Board's order stating that the company was in violation of Sections 8(a)(5) and (1) of the Act by

> "(1) Withdrawing recognition from the union in *refusing to enter into a contract of reasonable duration*, and
>
> (2) Unilaterally granting improvements in wages and other conditions of employment." (Emphasis supplied)

The Petitioner respectfully contends that the findings and orders of the Board and the Court below are contrary to the letter and spirit of the National Labor Relations Act, 29 U.S.C. §151, et seq.

This case arises out of the following facts. On February 11, 1963, the union was certified as bargaining representative by a majority of four or five votes out of 221 votes cast. (JA 71a) On June 24, 1963, a strike was called and almost immediately thereafter 190 people crossed the picket lines and returned to work. (JA 53a, 106a, 107a) On August 8, 1963, the strike ended and 36 of the employees were replaced permanently. (JA 53a, 54a) On August 9, 1963, a collective bargaining agreement was entered into to continue in effect through August 8, 1966. (JA 109a) The collective bargaining agreement called for a standard check-off clause but less than 30% of the employees ever signed up for check-off. This number of

*The abbreviation "JA" refers to the joint appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

employees authorizing check-off dropped to less than 20% at one time. Whereas the Court below characterized the number of employees as a "small but relatively stable percentage . . ." it must be borne in mind that slightly more than 35% of the original 30% of the employees who signed up for check-off later changed their minds. (JA 98a)

In February of 1966, several months prior to the expiration of the contract, the union began a campaign to gain the support of its members for the upcoming negotiations. As the Trial Examiner found,

> "In the appeals, the union frankly conceded that many employees in the unit, although sharing the benefits of organization, had failed to join the IBEW." (JA 186a)

Further, the union emphasized in a bulletin that it "had been too long a time for so few to be carrying the burden for so many." (Respondent's Exhibits 6 and 7, JA 59a, 60a)

The union further admitted in a bulletin in the same month,

> "Our job would have been a good deal easier and we could have accomplished much if more of you had supported us." (Respondent's Exhibit 7, JA 149a)

On May 11, 1966, the union gave the company notice of its desire to make amendments and alterations to the extant collective bargaining agreement. (G.C. Exhibit 4)

On May 18, 1966, the company acknowledged the union's letter and expressed its doubts that the union did in fact represent a majority of the employees in the unit stating,

> ". . . only the technicality of the existing contract stands as an obstacle to an election. We are there-

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> fore by this letter giving you notice that we desire to terminate the existing agreement in accordance with the provisions set forth therein, effective upon the anniversary date of the agreement."

The company did, however, offer to meet with the union to discuss wages, hours and conditions of employment in good faith. The company further urged the union to join in a consent procedure to conduct a representation election. The union acknowledged the propriety of an election by offering to consent based upon certain conditions. (JA 35a, 45a)

Early in August, prior to the expiration of the Agreement, the company received a sealed envelope with the signature of 75 to 80 employees on a petition stating they did not want to be members of the union. (TXD, JA 192a, 93a, 95a)

Subsequently the company and union met for purposes of collective bargaining. At each session the company asserted its good faith doubt as to the union's majority, and at no time did the union offer to prove that it represented a majority of the employees in the unit. (TXD, JA 189a, 93a)

On August 8th, the union negotiator stated that the union was prepared to accept the company's proposal on all issues for a one year contract. (JA 32a, 82a, 90a, 81a) The company then indicated it intended to file a petition for representation (JA 92a) but it would accept the union's proposal on a day to day basis so that the resulting contract would not be a bar to an election. (JA 82a) The union indicated it would discuss the company's proposal with the membership but never asked for another meeting. (JA 92a, 93a) The Trial Examiner found that:

> "The record supports the Respondent's [company's] argument that at their last meeting on August 8th,

the parties were at an impasse, and that the respondent stood ready to continue the negotiations, but the union, unwilling to accept the challenge of an election, did not seek any further meetings. Since, as has been found above, the respondent in this instance had good faith grounds on which it could insist upon an election, the union here must bear the burden for the breakdown of negotiations." (TXD, JA 198a)

REASONS FOR GRANTING THE WRIT

Section 8(d) of the National Labor Relations Act provides:

> "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times in conferring good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" (Emphasis supplied)

The recent case *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, 90 S.Ct. 821 (1970) deals with a situation similar to that in the instant case in that in *Porter* the Board ordered the company to grant check-off clause as a remedy to the company's bargaining in bad faith. In the instant case, whereas the Board's order is couched in general terms, the lower Court has held at page 4 of its appended opinion that the Board found the company "had violated Section 8(a)(5) and (1) of the Act by:

> "1. Withdrawing recognition from the union in *refusing to enter into a contract of reasonable duration. . . .*"

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Further, the Court below held at page 7 of its opinion,

> "The Board's cross-petition for enforcement of its order is granted."

The basis of the Board's opinion is contained in its statement found in its decision and order (JA 204a) wherein it stated:

> "We concluded that the Trial Examiner's finding that the respondent bargained in good faith is clearly erroneous. In our judgment, even if it were to be found that the 'whole congeries of facts . . . provided respondent with sufficient grounds to conclude that the union's majority by the spring of 1966, was very dubious indeed [,]' the record nevertheless supports a finding that the respondent did not assert such doubt in good faith."

The Board then stated in its remedy . . . .

> "Consequently, we shall order the respondent to bargain upon request with the union to cease and desist from any like or related unfair labor practices in the future."

This general statement when coupled with the findings of the court below in adopting the Board's cross-petition for enforcement which states at page 17,

> "(1) The company effectively withdrew recognition by declining to execute a contract *with any significant duration and by* refusing to notify the union thereafter about changes in wages and working conditions. . . ." (Emphasis supplied)

flies directly in the face of this Court's language in *Porter* wherein this Court stated,

> "For reasons to be stated we hold that while the Board does have power under the Labor-Management Relations Act . . . to require employers and employees to negotiate, *it is without power to compel a company*

or a union to agree to any substantive contractual provision of a collective bargaining agreement." (Emphasis supplied)

In *NLRB* v. *American National Insurance Company*, 343 U.S. 395, 96 L.Ed. 1027, 72 S.Ct. 24 (1952), this Court held,

> "In 1947, the fear was expressed in Congress that the Board 'has gone very far, in the guise of determining whether or not employers have bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may make or may not make.' Accordingly, the Hartley Bill, passed the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submissions of counter proposals.
>
> "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession." (*American National Insurance Company*, page 404)

Further, the Court stated,

> "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters *is an issue for determination across the bargaining table, not by the Board.* If the latter approach is agreed upon, the extent of union and management participation in administration of such matters is itself a condition of employment to be settled by bargaining." (Emphasis supplied) (*American National Insurance Company*, pages 408, 409)

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Even before *American National*, the Court stated in *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937),

> "The Act does not compel agreement between employers and employees. It does not compel any agreement whatever . . . *the theory of the Act is that free opportunity for negotiation* with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustment and agreements which the Act in itself does not attempt to compel." (Emphasis supplied) (*Jones and Laughlin*, page 45)

Alteration of the Board's decision by the Court below in finding that the company "refused to enter into a contract of reasonable duration," is tantamount to the imposition of its judgment regarding contractual provisions for that of the company, the union, and even the Board.

In *Majure* v. *NLRB*, 197 F.2d 735 (5 Cir. 1952) the Court cited with approval the Supreme Court's decision in *American National Insurance Company, supra*, and stated,

> "That the obligation of the employer to bargain in good faith does not require the yielding of a position fairly maintained, *nor permit the Board, under a guise of finding of bad faith, to require the employer to contract in a way which the Board might deem proper.*" (*Majure*, page 739)

Since the Board is admonished from requiring the company to bargain in a fashion acceptable to the Board's concept of propriety *a fortiori* the Court of Appeals may not do likewise in violation of the same admonition.

Perhaps the most prophetic pronouncement in this area was that of now Chief Justice Burger in his dissent-

ing opinion[1] in *United Steelworkers* v. *NLRB*, 390 F.2d 846, cert. den. 391 U.S. 904 (1968) wherein he stated,

> "The majority opinion encourages a new bargaining device that can only serve to infringe on the whole collective bargaining process. The parties may now reach an overall contract incorporating those provisions they agree on and excluding those that they do not after the usual 'horse trading' process of bargaining, then one party can come to the Board and claim that the refusal to agree to some provision which was not included was an unfair labor practice because the recalcitrant party lacked a sufficient business or union reason." (*United Steelworkers*, page 858)

Indeed, even more prophetically Chief Justice Burger stated,

> "The Board and unions generally may well come to regret the day when component parts of bargaining issues are considered in isolation." (*United Steelworkers*, page 858)

We are now at that day. Surely no case could furnish a better example of the very situation envisioned by the Chief Justice than the instant case. It will be recalled as the record accurately reflects, the parties were in complete agreement as to all issues of wages, hours and conditions of employment save that of duration. (JA 32a) That union was unable through exerting its powers of persuasion or its threats of strikes (JA 93a) to obtain a duration clause which was satisfactory to it. The union now urges the Board to superimpose a duration clause not agreed to by either party and indeed the Court of Appeals has ordered such a proposal by the company, for the purpose of arriving at a contract which would have

1. Had *United Steelworkers* been decided according to *H. K. Porter*, the dissent might well have been the majority opinion.

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come about through bargaining but for the union's refusal to accept the company's good faith proposal. This type of reasoning was flatly rejected recently in *H. K. Porter, supra.*

In contrast to *United Steelworkers* the instant case contains a good and sufficient reason for denying a particular clause, here the duration clause. It is difficult to imagine a better or more sufficient reason for rejecting a duration clause which would carry the company well past any reasonable opportunity for conducting an expeditious representation election among the employees since both the Board and the Court have conceded that the company had a reasonable basis for a good faith doubt that the union in fact represented a majority of its employees. The propriety of an election was admitted by the union but the election has long been barred by the technicality of the pending unfair labor practice charge which was without legal foundation from inception.

The Board and the Court below have consistently ignored the foremost case regarding bargaining for a duration clause. In *NLRB* v. *Yutana Barge Lines,* 315 F.2d 524, 52 LRRM 2750 (9 Cir. 1968) the Court stated:

> "It is mandatory upon an employer to bargain with respect to the duration of a contract. (*United States Pipe & Foundry Co.* v. *NLRB,* 298 F.2d 873, 49 LRRM 2540 [5 Cir. 1962, approving 129 NLRB 357, 46 LRRM 1542 (1960)]); however, the Act does not require agreement and 'the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' *NLRB* v. *American National Insurance Co.,* 343 U.S. 395, 494, 30 LRRM 2147 (1952). No inference of bad faith can be rested upon an employer's insistence upon particular substantive provisions unless those provisions concern trivial matters or are obviously intolerable. *NLRB*

v. *Reid and Prince Mfg. Co.*, 205 F.2d 131, 32 LRRM 2225 (1 Cir. 1953, Cert. denied, 346 U.S. 887, 33 LRRM 2133, 1953); *NLRB* v. *Montgomery Ward & Co.*, 133 F.2d 676, 686, 687, 12 LRRM 508 (9 Cir. 1943); *NLRB* v. *Tower Hosiery Mills, Inc.*, 180 F.2d 701, 25 LRRM 2509 (4 Cir. 1950), Cert. denied, 340 U.S. 811, 26 LRRM 2611 (1950); Cox, *The Duty to Bargain In Good Faith*, 71 Harvard Law Review, 1401,

> "The duration of a contract is a substantive matter, and *Yutana's* demands for a contract limited to its operating season was not unduly harsh on its face."

It is important to note in *Yutana* that the Trial Examiner examined all of the conduct of the employer not in isolation regarding the duration proposal but rather,

> ". . . in light of other conduct and circumstances [and] he found it to be evidence which along with other evidence, justified an inference of bad faith." (*Yutana*, page 2753)

In the instant case the Trial Examiner likewise examined all of the circumstances surrounding the negotiation and found the employer to be bargaining in good faith. (TXD, JA 184a, et seq.)

In *Yutana*, the Board looked only to the proposal on duration, disregarding the Trial Examiner's consideration of all the circumstances and found that the company was bargaining in bad faith. The Court of Appeals reversed stating,

> ". . . standing alone a proposal of a contract of a lesser duration is not substantial evidence of bad faith. See *NLRB* v. *Henry Heide, Inc.*, 219 F.2d 46, 35 LRRM 2378 (2 Cir. 1955)." (*Yutana*, page 2753)

In *Henry Heide, Inc., supra*, the Court found,

> "If this finding [of refusal to bargain] rested exclusively on respondent's adamant refusal to bargain

> on a single item, we would hold that the Board erred." (*Henry Heide, Inc.*, page 2381)

The Court of Appeals for the Sixth Circuit has stated,

> "The National Labor Relations Act is remedial rather than punitive and contemplates protection of public rights which it creates and defines. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940); *Consumers Power Co.* v. *NLRB*, 113 F.2d 39 C.A. 6, 1940)."[2]

The general rule has further often been stated to be that the Board has broad remedial powers in order to effectuate the purposes of the Act. Among the most important purposes of the Act is to insure the employees their untrammeled right to select their bargaining representative pursuant to Section 7 of the Act. *Joy Silk Mills* v. *NLRB*, 185 F.2d 732, 87 U.S. App. D.C. 360, cert. den. 71 S.Ct. 734, 341 U.S. 914, 95 L.Ed. 1350. What of the employees' rights in the instant case?

There is ample evidence in this case which has prompted both the Board and the Court below to agree that the company had a reasonable doubt as to the union's majority status. Indeed, the Board entertained the idea of conducting a representation election before rejecting it on the basis of the Company's conduct after negotiations ceased. Whereas, case law has established that a company may not prosper by its illegal activity, the realities of the situation cannot be ignored. Again it must be borne in mind that the company and the union would have had a complete collective bargaining agreement had the union accepted the company's proposal regarding duration. The company's wage increases would have thus been made under the scope of a contract and within the

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2. *NLRB* v. *Brown Lumber Co.*, 336 F.2d 641 (6 Cir. 1964).

persuasible language of the management clause which had tentatively been accepted by the union.

In the alternative, it must be borne in mind that the company timely served notice of its intention to terminate the contract pursuant to the extant agreement in which case its conduct after August 9th consisted of operating its business without an agreement. In either event the stigma of the company's activity is substantially lessened and all of the company's activity which may have hampered the laboratory conditions for a representation election occurred nearly four years ago.

The question presented to this Court is whether or not the employees should suffer for the failure of the company to timely file a representation petition pursuant to dimly outlined case law. The Court of Appeals for the Sixth Circuit answered this very question when it stated in *NLRB* v. *Ben Duthler, Inc.*, 395 F.2d 28 (6 Cir. 1968),

> "A bargaining order at this stage might greatly impair the Section 7 rights of the majority of Duthler's employees, who voted against Local 20, but who might feel compelled to be a member of their *exclusive* bargaining agent even though they prefer another union or no union at all. (Emphasis theirs) (*Duthler*, page 34)[3]

The Court in *Duthler* further stated,

> "The purpose of the Board is to protect the bargaining rights of employees, not the bargaining rights of unions. See *National Labor Relations Board* v. *S.S. Logan Packing Co.*, 386 F.2d 562, 564 (4 Cir. 1967) supra. The bargaining interests of a union are protectable only insofar as those interests coincide with

3. In the instant case a substantial number of employees had signed a petition stating that they did not wish to belong to the union in order to work at the company's plant. (JA 93a, 95a)

the interests of employees, 29 USC §151, §157, §158 (a)(3), §158(b)(1)(A), §158(b)(7); that coincidence of interests cannot be determined until a majority of the employees clearly express their desire that the union be their bargaining representative. We find that in this case a rerun election would more clearly express the employees' desires and therefore deny enforcement of the Board's bargaining order." (Emphasis supplied) (*Duthler*, page 34)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted, or in the alternative, that its Petition for a Writ of Certiorari be granted and the judgment of the Court below vacated and the case remanded for further consideration in light of *H. K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99, pursuant to this Court's order *Tex Tan Welhausen Co.* v. *NLRB*, ... U.S. ....., Bureau of National Affairs Daily Labor Report No. 86, A-1 (May 4, 1970).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three (3) copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit or Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Request for Vacation of Judgment and Remand to the United States Court of Appeals for the Sixth Circuit for Further Consideration and Appendix have been sent by United States Mail to the office of General Counsel, National Labor Relations Board, Washington, D. C. 20570, on this 13th day of May, 1970.

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STATUTES

Labor-Management Relations Act of 1947, as amended (29 U.S.C.A. §151 et seq.):

(29 U.S.C.A. §158(a)(1) and (5)); Section 8(a)(1) and (5):

(a) it shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

(29 U.S.C.A. §158(d)); Section 8(d):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration

date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Meditation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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No. 18937

United States Court of Appeals

FOR THE SIXTH CIRCUIT

BALLY CASE AND COOLER, INC., OF DELAWARE,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
LOCAL 2130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Intervenor.

ON PETITION for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Decided October 17, 1969.

Before: O'SULLIVAN, MCCREE, and COMBS, Circuit Judges.

COMBS, Circuit Judge. This case presents the petition of Bally Case and Cooler, Inc., to review and set aside a decision and order of the National Labor Relations Board, reported at 172 N.L.R.B. No. 106, finding that the company had committed unfair labor practices in violation of 29 U.S.C. § 158(a)(1) and (5). The order directs the company to cease and desist from its unlawful activities, to bargain with the union upon request, and to post the usual notices. The Board has filed a cross-petition for enforcement; the union has been permitted to intervene in support of the Board's petition.

The company's principal office and plant is located in Bally, Pennsylvania, where it manufactures and distributes refrigerated food display cases. Following an election which the union won by a slim margin, the union was certified as the bargaining representative for a unit comprised of approximately 250 of the company's production and maintenance employees. An economic strike followed in June, 1963 but, after state court injunctive proceedings were instituted, most of the employees crossed the picket line and returned to work. The strike continued, however, until August 9, 1963, when a collective bargaining agreement was executed between the company and the union to remain in effect through August 8, 1966.

In early 1966, the union distributed circulars to the employees outlining its accomplishments and asking for financial support. Only a small, but relatively stable, percentage of the employees had been authorizing the company to withhold union dues from their pay checks. The highest number of authorized checkoffs was seventy-three in April, 1964, while the lowest number was forty-eight in June, 1965. On August 8, 1966, the date the contract expired, fifty-nine employees were authorizing checkoffs.

On May 11, 1966, the union notified the company that it desired to make alterations and amendments to the collective bargaining agreement then in force. The company responded by letter dated May 18, 1966, stating that "it is our good faith belief that your union does not in fact represent a majority of the employees in our plant." The letter then recited that the company wished to terminate the existing agreement and asked the union to agree to a consent election, stating that a representation petition would be filed "at the appropriate time." In conclusion, the company agreed to meet with the union and "discuss

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in good faith any subjects that you deem relevant. But at no time, in doing so, do we waive the position which we have taken in the face of the evidence of your lack of representation that is before us."

Collective bargaining sessions were held on June 17, July 1, July 28, July 29, and August 8, 1966. During this period, the company on several occasions reiterated its doubt as to the union's majority and asked the union to consent to an election. The union did agree to an election at the July 1 meeting, provided the company would include a union shop provision in a new contract if the union won the election.

The negotiations progressed until finally, at the July 28 session, the union offered to withdraw its non-economic demands except for a union shop provision and an improved management rights clause. On July 29, company spokesmen countered the union's offer of the previous day by presenting a written proposal setting forth increased economic benefits which the company was prepared to offer in a new contract. In response to questions propounded by union representatives, the company then first informed them that any agreement would be effective only on a week-to-week basis so that the new contract could not act as a bar to an election. The union membership later rejected this offer and authorized a strike. The parties agreed, however, to meet again on August 8. In the meantime, the union filed unfair labor practice charges against the company. A company attorney testified that it was during this interim that he received a petition signed by seventy-five to eighty employees stating that they did not feel they should have to belong to a union to work at the company's plant.

At the meeting held on August 8, the union offered to drop all its demands and accept the proposal made by

the company on July 29 if the company would agree to a one-year contract. The union also offered to withdraw the unfair labor practice charges which it had previously filed. The company took the position that it could then only execute an agreement on a day-to-day basis because it planned to file a representation petition the following day. The negotiations ended upon this note, and the company filed its representation petition on August 9.

On August 12, the assembled employees were told in a speech by a company attorney that the bargaining agreement had expired, but that the five cents per hour wage increase offered to the union on July 29 would nevertheless be put into effect. Then, on August 23, each employee received an additional twenty cents per hour wage increase and, on September 1, employees with fifteen years of service were given an additional week of paid vacation.

The Board, reversing the Trial Examiner's recommended dismissal of the complaint, found, on the basis of the factual situation outlined above, that the company had violated Section 8(a)(5) and (1) of the Act by (1) withdrawing recognition from the union in refusing to enter into a contract of a reasonable duration, and (2) unilaterally granting improvements in wages and other conditions of employment. The question raised here is whether these findings are supported by substantial evidence. We find that they are and therefore grant the Board's petition for enforcement.

Absent special circumstances, a union enjoys an irrebutable presumption of majority status for one year after its certification. Thereafter, the presumption is rebutable, and an employer who has a reasonable basis in fact to doubt an incumbent union's majority status and

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who asserts that doubt in good faith may refuse to recognize and bargain with the union. *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F.2d 588 (5th Cir. 1966); *Celanese Corp.*, 95 NLRB 664 (1951). See *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954). The decisive issue here is whether the actions of the company were taken under a reasonably based doubt asserted in good faith. The Board concluded that, even if all the facts did disclose a sufficient basis upon which to doubt the union's majority, the company did not assert that doubt in good faith. In reaching that conclusion, the Board emphasized the company's delay in filing a representation petition and its conduct in unilaterally granting wage and vacation increases far in excess of what the union had been willing to accept.

It has been noted that, when an employer has doubt about the majority status of an incumbent union which has demanded bargaining for a new agreement, it is generally the better practice for the employer to petition the Board for a new election or other relief and to continue bargaining in good faith. *Brooks* v. *N.L.R.B.*, 348 U.S. at 104, n. 18; *United Aircraft Corp., et al.* v. *N.L.R.B.*, ... F.2d ..... (D.C. Cir. 1969). Filing the representation petition promptly will foreclose the possibility of an employer using his "doubts" as a bargaining weapon in subsequent negotiations. The company's delay in filing a petition for an election would not per se support an inference of bad faith on the part of the employer although it could serve as cumulative evidence of bad faith. Cf. *N.L.R.B.* v. *Downtown Bakery Corp.*, 330 F.2d 921 (6th Cir. 1964).

Here, the Board relied on a combination of factors as evidence of the employer's bad faith. Although the company admittedly voiced its doubt of the union's majority

on several occasions, it did not initially file a representation petition; instead it entered negotiations with the union without indicating that any negotiated contract would be subject to the outcome of a Board conducted election.[1] When the delay in filing the petition is viewed in conjunction with the company's failure to inform the union until late in the negotiations that an election was a condition precedent to the execution of a successfully negotiated contract, the record certainly suggests, if it does not command, the inference that the company's conduct in questioning the union's standing was actually directed toward extracting concessions from the union and casting it in a bad light. Compare *Poray, Inc.*, 160 NLRB 697 (1966). Such an inference is reenforced by the fact that, immediately after the bargaining agreement had expired and the election petition had been filed, the company granted the five cents per hour wage increase which the union had previously approved. Shortly thereafter, vacation benefits and a wage increase were put into effect. This unexpected and, as far as this record shows, unprecedented benevolence by the company in bestowing these benefits so soon after filing the election petition does not strike one as entirely consistent with the company's position that it was at all times raising its doubt of the union's majority in order to afford its employees an opportunity to freely express their choice in an elec-

1. The company's argument that it could not petition for an election until after the contract had expired is without merit. A careful reading of Board precedent clearly reveals that an election petition filed more than sixty but less than ninety days before the expiration date of an existing agreement will be timely. See Poray, Inc., 160 NLRB 697 (1966); Continental Can, 145 NLRB 1427 (1964); General Cable, 139 NLRB 1123 (1962); Absorbent Cotton, 137 NLRB 908 (1962); Montgomery Ward & Co., 137 NLRB 346 (1962); Leonard Wholesale Meats, 136 NLRB 1000 (1962); Mueller Industries, 132 NLRB 469 (1961); Phillips Petroleum Co., 130 NLRB 895 (1961); Deluxe Metal Furniture Co., 121 NLRB 995 (1958).

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tion. The Board viewed this conduct not only as evidence of bad faith, but also as independently constituting a violation of Section 8(a)(5). Generally, such unilateral action by an employer in instituting changes in subjects of mandatory bargaining would violate Section 8(a)(5). *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962); *Korn Industries* v. *N.L.R.B.*, 389 F.2d 117 (4th Cir. 1967). Of course, if the company's doubt was raised in good faith, it was under no duty to negotiate with the union and its unilateral action would not necessarily violate Section 8(a)(5). *N.L.R.B.* v. *Downtown Bakery Corp.*, supra.

In any event, we are of the opinion that the Board could reasonably infer from this pattern of conduct that the company did not in good faith seek to test the union majority in a fair election, but rather sought to stifle the union.[2] The company contends that the increased benefits which it granted were economically justifiable and that similar changes had been made unilaterally under the management rights clause of the expired contract. However, since the undisputed facts relied on by the Board are open to conflicting inferences, we are not at liberty to draw an inference different from that drawn by the Board even though it may seem to us more plausible

2. The company's reliance on United Aircraft Corp., et al. v. N.L.R.B., ... F.2d ..... (D.C. Cir. 1969), is misplaced. The factors relied on by that court in reversing the Board's finding of lack of good faith are not present here. For example, there, the company possessed written admissions by the union that it did not have a majority. Furthermore, the union had submitted demands which it recognized as obviously unacceptable whereas here it was the employer who interjected the proposal calculated to be rejected by the union. The court also emphasized in United Aircraft that the Board found no independent unfair labor practices which were aimed at undermining the union. Here, the Board found that, irrespective of the good faith issue, the company's unilateral action in conferring economic benefits, subsequent to the filing of the election petition, constituted independent violations of Section 8(a)(1). N.L.R.B. v. Exchange Parts Co., 375 U.S. 405 (1964).

and reasonable to do so. *N.L.R.B.* v. *H & H Plastics Manufacturing Co.*, 389 F.2d 678 (6th Cir. 1968). We conclude that the record contains substantial evidence on which to predicate a finding that the company did not entertain a good faith doubt as to the union's majority. The Board, therefore, properly held the company's actions in withdrawing recognition from the union and in unilaterally changing conditions of employment to be in violation of Section 8(a)(5) and (1) of the Act.

The Board's cross-petition for enforcement of its order is granted.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1570

BALLY CASE AND COOLER, INC., OF DELAWARE,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

LOCAL 2130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Intervenor.

ADDITIONAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND REQUEST FOR VACATION OF JUDGMENT AND REMAND TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR FURTHER CONSIDERATION

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TRIAL EXAMINER'S DECISION.

(Issued May 19, 1967.)

ROBERT E. MULLIN, Trial Examiner: This case was heard in Allentown, Pennsylvania, on January 23 and 24,

1967, pursuant to charges duly filed and served at various times in 1966,[2] and a complaint issued on November 17, 1966. The complaint presents questions as to whether the Respondent refused to bargain collectively with the Charging Party (herein called the Union, or IBEW), and whether it engaged in various other acts of interference, restraint and coercion in violation of Section 8(a)(1) of the Act. In its answer, the Respondent conceded certain facts as to its business operations, but it denied all allegations that it had committed any unfair labor practices.

All parties appeared at the hearing, with counsel, and were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally at the close of the hearing and to file briefs. The parties waived oral argument. At the conclusion of the hearing, a motion to dismiss the complaint, made by the Respondent, was taken under advisement by the Trial Examiner. It is disposed of as appears hereinafter in this Decision. On March 7, 1967, the General Counsel and the Respondent submitted thorough and comprehensive briefs on the issues. No brief was received from the Union.[3]

Upon the entire record in the case, including the briefs of counsel, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT.

I. THE BUSINESS OF THE RESPONDENT.

The Respondent, a Pennsylvania corporation, with its principal office and plant at Bally, Pennsylvania, is en-

[2] The Union filed an original charge on August 3, a first amended charge on August 22, a second amended charge on October 7, and a third amended charge on November 10.

[3] The Respondent's brief was accompanied by a motion to correct the transcript in certain minor particulars. Since opposing counsel have filed no objections, the aforesaid motion is hereby granted.

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gaged in the manufacture and distribution of refrigerated cases for the food industry. During the year preceding the issuance of the complaint, the Respondent shipped manufactured products valued in excess of $50,000 to customers located outside the Commonwealth of Pennsylvania. Upon these facts, the Respondent concedes, and the Trial Examiner finds, that Bally Case and Cooler, Inc., is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED.

The Respondent concedes, and the Trial Examiner finds, that the Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES.

A. Introduction and Sequence of Events.

On February 11, 1963, the Union was certified by the Board as the bargaining agent for a unit made up of the Respondent's production and maintenance employees. At the election which preceded this certification,[4] out of some 221 valid votes cast, 113 were for and 108 were against the Union. Thereafter, while negotiations for a contract were in progress, the Union called a strike which began on June 24 and lasted until about August 8, 1963. During the first week of the strike the Respondent petitioned a State court for a restraining order and as a result of this petition and the hearing had thereon, the Court set a limit on the number of pickets which would patrol the plant entrances and established various other rules with respect to the picketing practices of the Union.[5] Irving

[4] The election was held on August 29, 1962.

[5] The State Court did not grant an injunction, but after securing a commitment from the Union that it would comply with the rules described above, the Court retained jurisdiction of the matter for the balance of the labor dispute.

W. Coleman, attorney for the Respondent and its Director of Industrial Relations, testified, and his testimony in this respect was in no way contradicted or denied, that immediately after the Court restricted the number of pickets, approximately 190 of the employees crossed the picket line and returned to work.[6] He further testified that during the strike, approximately 16 of the strikers were replaced permanently and after the conclusion of the strike about 20 strikers never sought reemployment. Subsequent to the termination of the strike, the parties executed a collective-bargaining contract which, by its terms was to be effective through August 8, 1966, and from year to year thereafter unless either party gave written notice of a desire to terminate, amend, or alter, at least 60 days prior to the original expiration date.[7]

During January and February of 1966 the Union distributed circulars to the employees at the plant wherein it outlined the employee benefits it had sponsored and solicited the support of all the employees in the bargaining unit. In these appeals, the Union frankly conceded that many employees in the unit, although sharing in the benefits of organization, had failed to join the IBEW. In one circular that was sent out from the union headquarters in February, after recounting the gains for which Local 2130 gave itself credit, there appears the suggestion that these gains could have been much greater "if all of us were together supporting the common cause." This

[6] Mr. Coleman testified that at the time of the strike there were about 250 employees in the appropriate unit.

[7] There is no dispute, and the Trial Examiner finds, that at all times material herein, all production and maintenance employees at the Respondent's plant, including shop clerical employees, but excluding office clericals, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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same letter concludes an appeal that more employees join the IBEW with the declaration "It has been too long a time for so few to be carrying the burden for so many." In another letter distributed to the Bally employees that same month, the officers of Local 2130 reiterated the need for more support from the employees in the bargaining unit. Thus, after recounting some of the benefits which had been won during the past 2½ years, the letter states:

> Our job would have been a good deal easier and we could have accomplished much more if more of you had supported us. Our grievance committee was told at one of their meetings with the Company that they [the company] felt that as long as so many of you did not join the Union they [the company] assumed that you were satisfied with things as they were * * *. In a short time we will be negotiating for a new contract. Our chances of getting the things you want will be a great deal better if we can be speaking for all of you at that time * * * to be successful let those that can give you these things know how you feel. By signing those cards and joining our organization you will be letting management know what you expect * * *. Have a voice in your future at the plant. Give us your support. Help us get a good contract. Join now.

The collective-bargaining agreement required all employees who were members of the Union on August 20, 1963, and all employees who thereafter became members during the term of the contract, to maintain that membership. Another provision required the Respondent to deduct union dues from the wages of those employees who signed a conventional checkoff authorization. The extent to which these contractual terms were utilized did not indicate any widespread support for the Union among the employees. Throughout the 3 years that the contract was in effect, there was never a time when as many as

30 percent of the employees authorized dues deductions from their wages and at one point this percentage dropped as low as 20. Thus, Mr. Coleman testified that, whereas the unit had from 230 to 250 employees, the highest number of checkoff authorizations on file in the payroll office was 73, a figure that was reached in April 1964. He further testified that the lowest number was 48, the total in June 1965, and that in August 1966, the month that the contract expired, there were only 59 checkoff authorizations on file with the Respondent.[8]

By letter dated May 11, 1966, the Union notified the Respondent of its desire to amend the 1963 agreement. In its response, dated May 18, 1966, the Company asserted that it had a good faith doubt that the Union represented a majority of the employees in the unit; gave notice of its desire to terminate the agreement as of the anniversary date; announced that it would file a petition for determination of the representation question "at the appropriate time"; and asked that the Union expedite the resolution of the latter issue by agreeing to a consent election. The letter concluded with the statement:

> In the meantime, subject to the limitations of this technical situation, we will meet with you and discuss in good faith any subjects that you deem to be relevant. But at no time, in doing so, do we waive the position which we have taken in the face of the evidence of your lack of representation that is before us.

[8] Mr. Coleman's testimony was credible, undenied and uncontradicted. When he testified at the hearing he had the original checkoff authorizations at hand. These were offered to opposing counsel for use in his cross-examination. During the latter, counsel for the Union intimated that the percentage of checkoff authorizations at any given time was not a fair index of union strength because some of the employees paid their dues in cash. Although this avenue might have provided an effective rebuttal point, had the supporting evidence been available, counsel for the Union thereafter made no effort to produce any evidence along that line.

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B. The Bargaining Conferences.

The Respondent and the Union met for collective bargaining sessions on June 17, July 1, July 28, July 29 and August 8, 1966. No meetings were held after the latter date. It is undisputed that from the outset of the negotiations the Company's representatives stated that they had a good faith doubt that the Union represented a majority of the employees. Both at the first session and at numerous times thereafter the Company sought, without success, to secure the Union's agreement to a consent election. Mr. Coleman testified, credibly and without contradiction, that at no time during the negotiations did the union representatives offer to prove that the IBEW represented a majority of the employees in the unit.

On June 17, when the parties met for their first session, the Union was represented by Peter McCue, international representative for the IBEW, and Irvin Becker and Ralph Boyer, president and financial secretary, respectively, of Local 2130. The Company was represented by Mr. Coleman who appeared by himself.

At this meeting, two sets of proposed contract demands were presented to the Company, one from the representatives of Local 2130 and the other from Mr. McCue, on behalf of the International. Mr. McCue testified that at the opening of the meeting, Mr. Coleman restated the Company's doubts as to the Union's majority in the unit and requested a consent election. In response, according to McCue, the Union representatives declared that they were the certified representatives and that they desired to commence negotiations for a one-year contract. McCue testified that the Union's demands included a request for a "substantial wage increase,"[9] an increase in

[9] Throughout the negotiations the Union's request for a "substantial" wage raise was never translated into a specific figure.

vacation benefits and improvements in the health and welfare provisions of the current agreement. McCue further testified that he also requested that the Respondent supply the Union with statistical data on the current wages, total cost of holiday pay, the cost of all fringe benefits being paid the unit employees and a seniority list of the employees.[10] McCue conceded that subsequent to this particular meeting all of the data requested was, in fact, supplied by the Company. In his testimony, Mr. McCue stated that there followed a substantial discussion of the various items in the Union's demands.

This latter testimony was contradicted by Mr. Coleman. According to Coleman, after he had stated the Company's belief that the Union did not represent a majority and solicited the Union to join with it in requesting an election, the Union representatives thereafter handed him their contract proposals and demands. Coleman testified that the meeting ended shortly thereafter and without any discussion of the various proposals. According to Coleman, the conference terminated abruptly when McCue took offense at something which the Respondent's attorney said, alleged that it was tantamount to calling McCue a liar and declared that if the remark was repeated he [McCue] would "give [Coleman] a damn good licking." Coleman testified that he thereupon left the meeting, after having told the union representatives that as a result of McCue's remarks he would discuss nothing further with them that day. Coleman's testimony as to this incident was credible and it was neither denied nor contradicted by any testimony offered by the General Counsel. It is the conclusion of the Trial Examiner that the meeting was concluded in substantially the manner that Coleman testified.

[10] Mr. McCue was not certain whether the latter information was requested at the meeting on June 17 or at the next session.

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On July 1, the parties met again. The Union was represented by McCue, Becker, Boyer and Eugene Findlay, the latter being an officer of Local 2130. The Respondent was represented by Attorneys Kothe and Hyman. At the outset of the meeting the Respondent had a court reporter present for the purpose of transcribing the negotiations. When McCue strongly objected to this procedure, however, the company representatives withdrew the reporter. Thereafter the parties proceeded to discuss the Union's demands. Earlier, and at the outset of negotiations, Attorney Kothe restated the Company's desire for an election and its request that the Union join in an agreement for a consent election because of the Respondent's doubt that the Union represented a majority of the employees. Mr. Hyman testified that at the end of the meeting, McCue told the company representatives that the Union would agree to an election provided that the Company would stipulate that if it lost the election, it would agree to a union shop provision in a new contract. To this proposal, Kothe replied that he would have to discuss the matter with the company officials, but that, in any event, he did not believe that the National Labor Relations Act permitted such an arrangement as to an election.

On July 28, the parties met for their conference. McCue, Becker and Boyer were present for the Union. Attorneys Kothe and Coleman, along with Harry Margolis, accountant for the Company, represented the Respondent. In addition to the foregoing, Walter Mosier, a mediator from the Federal Mediation and Conciliation Service, was present, along with Edward Feehan, a representative of the Pennsylvania State Mediation Service.

Once again, Kothe stated at the opening of the meeting that the Company had a good faith belief that the Union did not represent a majority of the employees and

that it wanted an election to determine the issue. The parties then went to a discussion of the Union's contract proposals. After discussing these for some time, McCue announced that in order to get a contract the Union would agree to withdraw all of its demands on noneconomic issues, other than its request for a union shop and an improved management rights clause, if the Company would bargain about the economic issues immediately. The Respondent's representatives thereupon asked for an opportunity to consider this proposal and the meeting was adjourned until the following day.

On July 29, the parties resumed their negotiations, with the parties represented by the same individuals as had been present the day before, including the Federal and State mediators. At the opening of the meeting the company representatives presented a written proposal which set forth the increased economic benefits which the Respondent was prepared to offer in a new contract. These included: (1) a general wage raise of 5 cents an hour; (2) a full holiday before Christmas and a half holiday on Good Friday; (3) increased vacation privileges to be effected by reducing from 10 to 8 years the eligibility for 2 weeks' paid vacation; (4) an increase in the amount of sick leave payments from $20 to $25 per week; (5) payment of a 20 cent night shift differential; and new provisions on (6) jury pay and (7) severance pay.

Immediately after the Respondent submitted its counterproposal to the union representatives, McCue inquired as to the proposed duration of any new agreement. Kothe responded that because the Company did not believe that the Union represented a majority and for that reason had consistently sought an election, the Respondent would not agree to a contract that would be effective for more than one week after August 8 in order that the

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new agreement would not act as a bar to such an election. McCue characterized the Company's proposal on the term of the new agreement as ridiculous and predicted that it would be impossible to secure its ratification by the union membership. However, he promised that the Company's proposals would be brought before the union members shortly. With that, the meeting adjourned.

Hyman testified that on August 2, McCue telephoned him at his law office to tell him that the union membership had met the night before and had rejected the company offer of July 29. He also told Hyman that the membership had authorized the Union to call a strike and that he wanted another meeting with the Respondent. Thereafter, through an exchange of telegrams, the parties agreed upon August 8 as the date for their next bargaining session. Coleman testified that, in the meantime, and shortly before the parties met again, the Respondent received a petition which read "I do not feel I should have to belong to the IBEW to work at the Bally plant" and underneath that caption there were 75 to 80 signatures of individuals employed at the Company.[11]

The bargaining conference of August 8 was also the last which the parties held. McCue, Becker, Boyer and Findlay were present for the Union, and Coleman and Hyman represented the Company. State Mediator Feehan was also present. McCue opened the meeting with the statement that the Union would not accept a contract of one week's duration, but that it would accept the Company's offer of July 29 if the latter would agree to a one-

[11] Coleman's testimony as to this petition was elicited on cross-examination. The petition itself was never offered in evidence. In his brief, the General Counsel suggests that some of the names on the petition were those of supervisors. This inference, however, is without the support of any affirmative evidence. Significantly, at the hearing no amendment to incorporate such an allegation in the complaint was ever offered.

year contract. Coleman rejected the proposal for a one-year agreement. After reiterating the Respondent's doubts as to the Union's majority standing, he stated that since the Company planned to file an RM petition for an election on the following day, at that point, it would only offer the Union an agreement on a day-to-day basis.

Shortly before this conference, the Union had filed an unfair labor practice charge against the Respondent, alleging that it was refusing to bargain in good faith. McCue testified that at their last bargaining session, when Coleman rejected the Union's request for a one-year contract, he told the company representatives that the Union would withdraw the unfair labor practice charge if the Company would incorporate the offer of July 29 in a one-year agreement. The Respondent remained steadfast, however, in its insistence that because of its doubt as to the Union's majority, an election was necessary, and that it could not agree to any contract of one year's duration on the ground that such action would forestall a balloting of the employees. On this note, the meeting ended. There were no subsequent bargaining sessions, nor any requests for meetings, and the Union never called a strike.

As a result of the Respondent's termination letter, written in May, the original 3-year contract between the IBEW and the Company expired on August 8. On August 9, the Respondent filed an RM petition with the Regional Office. (*Bally Case and Cooler, Inc.*, Case No. 4-RM-577).[12]

In a speech to the employees on August 12, 1966, Coleman reviewed the course of the Company's negotiations with the Union, the fact that the original contract ex-

[12] On November 17, 1966, the Regional Director wrote the Respondent that its petition in the RM case was being dismissed and that on that same date a complaint was being issued alleging that the Company had refused to bargain in good faith.

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pired on August 8 and that the following day the Company had filed a petition for an election with the Board. He further stated that, since the Union had filed an unfair labor practice charge, no election could be held until that charge was disposed of. He also told the employees that the reason that the Company had been unwilling to offer the Union a contract with a duration of more than one week was because of its doubts as to the union majority. Thereafter he told them that the items which tne Company offered during the negotiations would become effective as of August 9, and that, among other things, this included a 5 cents an hour increase for each employee and an increase in sick benefits from $20 to $25 a week. He concluded by suggesting that in the event any of the employees had any questions as to the present status of affairs that they bring them to the Regional Office of the Board.

On August 23, 1966, the Respondent posted a notice in the plant that all employees would get an additional increase of 20 cents per hour effective as of August 19. On September 1, 1966, in another notice, the Respondent announced that all employees with 15 years of service would receive a 3-week paid vacation.[13]

C. Contentions of the Parties; Findings and Conclusions in Connection Therewith.

The General Counsel contends that the Respondent was lacking any reasonable ground for believing that the Union no longer had a majority at the plant, that its course of conduct constituted bad faith bargaining and that, as a consequence, it violated Section 8(a)(5) by refusing to offer the Union a contract of more than one week's duration. The complaint further alleges that by

[13] Prior to this announcement, 2 weeks had been the maximum vacation which any employee could earn.

withdrawing recognition from the Union upon the expiration of the old contract on August 8, 1966, and by its grant of wage increases and vacation benefits on August 12, August 19 and September 1, the Company also violated Section 8(a)(5) and (1). All of these allegations are denied in their entirety by the Respondent.

The Board has held that, although a certified union's majority status is unrebuttable during the certification year, absent unusual circumstances, after the end of the certification year, the presumption of majority, though continuing, is rebuttable even without the unusual circumstances. *Celanese Corporation of America*, 85 NLRB 664, 672, cited with approval by the Supreme Court in *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 104; *U. S. Gypsum Company*, 157 NLRB No. 60. The General Counsel has relied, at the hearing and in his brief, on *Deluxe Metal Furniture Co.*, 121 NLRB 995, for the proposition that if the Respondent desired an election it was bound to file a representation petition prior to June 9, 1966, which was the last day prior to the so-called 60-day insulated period. According to the General Counsel, since the Respondent filed no such petition until much later, it could not assert thereafter the defense that it had a good-faith doubt as to the Union's majority.

Deluxe Metals, however, compels no such imperative as that set forth in the General Counsel's argument. The Board doctrine embodied in that case had reference to the situation where a rival union is attempting to upset an established bargaining relationship between an employer and an incumbent union. During the 60-day insulation period established by that decision, the employer and the incumbent are free to bargain without the "threat of overhanging rivalry and uncertainty." (*Deluxe Metals*, at p. 1001). Apart from the fact that the rival union situation

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considered by the Board in *Deluxe Metals* has no relevance here, the latter case does not stand for the proposition that an employer must petition for an election before the 60-day period, or be held to have waived his right to file a petition later, as the General Counsel appears to argue. Even *Deluxe* provides that if "the parties have forestalled automatic renewal and no new or amended agreement has been executed within the 60-day period, a petition will be timely if filed after the terminal date of the old contract * * *." (*Ibid*, at p. 1000.) Here the Company forestalled automatic renewal of its contract with the IBEW by its notice of termination on May 18, 1966. No new or amended agreement was executed thereafter and by its terms the old contract expired on August 8, 1966. In these circumstances, it would appear that *Deluxe Metals* would support the filing of the representation petition which the Company did, in fact, file on August 9, 1966. See *Electric Boat Division, General Dynamics Corporation*, 158 NLRB No. 95.[14]

Earlier herein it was found that the Union's original election victory in 1962 had been won by a narrow margin, that there was widespread lack of employee support for the strike in 1963, and that this was followed by the replacement of strikers and by some degree of turnover. During January and February 1966, in bulletins to the employees which came to the attention of the plant management, the Union conceded that its support from the

[14] Although the General Counsel assumes that the Respondent's RM petition would have been timely if filed prior to June 9, 1966, the beginning of the 60-day insulated period, this position does not find support in certain decisions issued subsequent to *Deluxe Metals*. Thus, the Board has held that where there is no rival, as in the present instance, an employer's petition is barred by a current agreement to which it is a party throughout the entire term and until the expiration of such a contract. *Absorbent Cotton Company*, 137 NLRB 908, 909; *Montgomery Ward & Co.*, 137 NLRB 346, 347-348; *cf., Building & Construction Trades Council*, 147 NLRB 1464, 1484.

personnel in the unit left much to be desired, and that it greatly needed additional members to strengthen its position at the forthcoming bargaining sessions. Throughout the three years that the contract was in effect the employees demonstrated a patent lack of enthusiasm for the checkoff, and the number of personnel who authorized the deduction of their dues never exceeded 30 percent. In the year preceding the expiration of the contract, the number dropped as low as 20 percent and, in August 1966, when there were about 250 employees in the unit, the Respondent had only 59 checkoff authorizations on file. As the General Counsel argues in his brief, none of these items, when viewed separately, might be considered substantial evidence on which the Employer could assume that the Union had lost its majority. The foregoing factors, however, can not be viewed separately or in isolation. When taken together this whole congeries of facts certainly provided the Respondent with sufficient grounds to conclude that the Union's majority by the spring of 1966 was very dubious indeed. For this reason, it is the conclusion of the Trial Examiner that at all times material herein the Respondent had a good-faith doubt as to the Union's majority in the appropriate unit.[15] Moreover, this doubt was set forth in the Respondent's letter to the Union on May 18, 1966, when it notified the latter of its desire to terminate the contract. At all subsequent bargaining sessions, the company representatives reiterated this doubt as to the Union's standing and the Respondent's desire for an election to resolve the question.

All the while it insistently preserved this position, the Respondent met with the Union and bargained in good

[15] It is also the conclusion of the Trial Examiner that the Respondent here involved demonstrated "by objective considerations that it ha[d] some reasonable grounds for believing that the union ha[d] lost its majority since its certification." *U. S. Gypsum Co.*, 157 NLRB No. 60, p. 6.

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faith. On July 29, the Company made a substantial offer as to economic items including wages and vacations, which the Union stated that it would accept only if it could have a one-year contract. Since it is the conclusion of the Trial Examiner that under the circumstances of this case the Respondent was entitled to insist upon an election,[16] the company representatives were not obligated to waive that right and accede to the Union's demand for a year long contract that would eliminate the prospects of an election for at least another 12 months.

The term of a contract is a mandatory subject for bargaining, but subsequent to the end of the certification year there is no requirement in the Act fixing any minimum requirement as to the length of such term, *The Hinde & Dauch Paper Company*, 104 NLRB 847, 848.[17] Here the Respondent, in an effort to preserve its request for an election upon the expiration of the old contract, first offered the Union a contract for one week's duration and then, on August 8, when the old agreement was expiring, it offered a day-to-day term. Unable to secure a one-year contract from the Respondent, and thus avoid the confrontation with the employees which an election would necessitate, the Union rejected this offer and did not ask for any further meetings after August 8.[18]

Apart from its attack on the Respondent's good faith during the negotiations, the complaint did not allege any

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[16] See: *Frito-Lay, Inc.*, 151 NLRB 28, 31-33; *Hammond & Irving, Inc.*, 154 NLRB 1071, 1073; *Cameo Lingerie, Inc.*, 148 NLRB 535, 538-539.

[17] *Cf., N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529 (C.A. 9); *N.L.R.B. v. Southern Coach & Body Co.*, 336 F. 2d 214, 219-220.

[18] "The Union's refusal, when challenged, to submit the issue to an election where each employee would be permitted in secrecy to make his choice, leads to the inescapable inference that it, too, was doubtful and fearful of the result." *N.L.R.B. v. Laystrom Manufacturing Co.*, 359 F. 2d 799, 801 (C.A. 7).

independent acts of interference, restraint, or coercion during the bargaining period that would support an allegation that the Respondent's insistence on an election was motivated by a design to gain time during which to destroy the Union's majority. Nor is there any basis in the record for such a contention.

The record supports the Respondent's argument that at their last meeting on August 8, the parties were at an impasse, and that the Respondent stood ready to continue the negotiations, but that the Union, unwilling to accept the challenge of an election, did not seek any further meetings. Since, as has been found above, the Respondent in this instance had good faith grounds on which it could insist upon an election, the Union here must bear the burden for the breakdown of negotiations. Accordingly, the Trial Examiner concludes and finds that the Respondent did not violate Section 8(a)(5) and (1) by its conduct during the course of the negotiations from June 17 through August 8, 1966, or at any time prior thereto. *Poray, Inc.*, 160 NLRB No. 61; *Frito-Lay, Inc.*, 151 NLRB 28, 32, 33; *Mitchell Standard Corporation*, 140 NLRB 496, 499-500; *Randall Company*, 133 NLRB 289, 295; *Diamond National Corporation*, 133 NLRB 268, 269-270.

Since the Respondent had a good faith reason to doubt the Union's majority, it was not a violation of the Act, for the Respondent to withdraw recognition from the Union at the expiration of the old contract on August 8, 1966,[19] to file a petition for an RM election on August

[19] Under the circumstances present here, had the Respondent continued to recognize the Union as the exclusive bargaining agent after the expiration of the old contract, it would have done so at its peril and subject to the stern injunction set forth in the Act and in those cases which forbid recognition and bargaining with a union that does not represent a majority. See *Garment Workers v. N.L.R.B.*, 366 U.S. 731, 737-740, and cases there cited.

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9, and to put into effect those benefits which it had first offered to the Union on July 29, 1966, and which the then bargaining agent had rejected unless it could have a contract of one year's duration. *Empire Terminal Warehouse Company*, 151 NLRB 1359, 1360-1362; *Taft Broadcasting Company*, 163 NLRB No. 55, pp. 7-8.[20]

The General Counsel further contends that the Respondent violated the Act when, on August 23, 1966, it announced a wage increase of 20 cents an hour, and, on September 1, 1966, it announced a liberalized vacation benefit for those with over 15 years of service with the Company.

These allegations should be viewed in the context of the prior bargaining relationship between the Company and the Union. On February 17, 1966, the Respondent notified the Union that it planned to effectuate a 10 cent an hour increase on February 22. In its letter to the Union on the former date, the Respondent set forth the view that although it was giving this notice to the Union as a courtesy, it was not compelled to do so because the broad managerial rights clause in the collective-bargaining agreement permitted the Company to take this action without any communication with the Union. In the Union's response, Mr. McCue acknowledged that the IBEW would not challenge the course of action which the Company announced in its letter of February 17.

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[20] The General Counsel likewise alleged, in his brief, but not in the complaint, that the Respondent also violated the Act when, in his speech on August 12, 1966, Attorney Coleman informed the employees that they should feel free to submit their grievances directly to the management. Since, as has already been found herein, the Respondent had a *bona fide* doubt that the Union any longer represented a majority of the employees in the appropriate unit, and the collective bargaining agreement had expired, the Respondent could not require that the employees continue to channel their complaints through the union grievance machinery. It was no violation of the Act for Coleman to tell them what the law permits.

The same management rights provision of the collective bargaining agreement was used by the Respondent to support another decision, taken unilaterally and at about the same time as the above sequence of events, to close its porcelain plant. Once again, the Union did not challenge the Respondent's construction of the managerial rights clause in the bargaining agreement. Later during the summer of 1966, the Union strove to secure a greatly modified management rights clause. In this, it was unsuccessful. Indeed, on August 8, the Union offered to accept all the Company's terms for a new contract, *including the old management rights clause,* if only the Respondent would agree to a contract of one year's duration.[21] It is also significant, that during the course of the spring and summer of 1966, both the Union and the Company had studied the need for substantial wage increases to meet the competitive conditions of the labor market.

Since the Trial Examiner has already found that the Respondent bargained in good faith with the Union up to the point of impasse on August 8, a discriminatory motivation for the subsequent exercise of its business judgment is not to be imputed lightly. *Drug Fair-Community Drug Co.*, 162 NLRB No. 72 (pp. 13-14 of the Trial Examiner's Decision). Most particularly would that appear to be true in a case such as the present where the earlier, unilateral, action as to wages and other managerial decisions had gone unchallenged by the Union.[22]

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[21] See the credible and uncontradicted testimony of Irving Coleman to this effect.

[22] In one instance the Respondent's action had been challenged by the Union, but with no success. This was an earlier matter involving the Company and the Union, *Bally Case and Cooler Inc.*, Case No. 4-CA-3307, which had been resolved in a settlement agreement approved in July 1964. The case concerned, *inter alia*, the Respondent's discontinuance of a Christmas bonus. At the present hearing, Mr. McCue testified that the Board's Regional Office had sustained the Company's position as to the bonus issue and, in so doing, had relied on the broad managerial rights clause in the existing collective-bargaining agreement.

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Under the circumstances present here, it is the conclusion of the Trial Examiner that the General Counsel has not established by a preponderance of the evidence that the Respondent violated the Act, by its grant of the wage increase announced on August 23, 1966, or by its announcement on September 1, 1966, of additional vacation benefits for its senior employees. *Fleming & Sons of Colorado, Inc.*, 147 NLRB 1271, 1274, 1284; *Harvey Aluminum, Inc.*, 156 NLRB 1353, 1363-1364.

CONCLUSIONS OF LAW.

1. The Respondent is engaged in commerce and the Union is a labor organization, all within the meaning of the Act.

2. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

On the basis of all the foregoing, therefore, the Trial Examiner will recommend that the complaint in this proceeding be dismissed in its entirety.

RECOMMENDED ORDER.

On the basis of the foregoing findings of fact and conclusions of law the complaint heretofore issued in this proceeding is hereby dismissed.

Dated at Washington, D. C.

ROBERT E. MULLIN,
Trial Examiner.

DECISION AND ORDER

(Entered July 10, 1968.)

On May 19, 1967, Trial Examiner Robert E. Mullin issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint herein be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs. The Respondent filed a brief in support of the Trial Examiner's Decision and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent herewith.

As more fully set forth by the Trial Examiner, the Union was certified on February 11, 1963, after an election, and on August 9, 1963, following an economic strike, the parties executed a 3-year contract effective until August 8, 1966. On May 11, 1966, the Union gave timely notice of its desire to modify the contract; on May 18, 1966, the Respondent replied stating it questioned the Union's majority status and wished to terminate the

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agreement. The Union thereafter strongly asserted its continued status as majority representative.

Despite the Respondent's asserted good faith doubt as to the Union's majority status and the Respondent's statement that it would file a petition for an election, it did not do so until August 9, 1966, the day after the contract's termination date. Nevertheless, and while it continued to repeat its claim of doubt concerning the Union's majority, the Respondent met with the Union on June 17, July 1, 28, and 29, and August 8 for the stated purpose of engaging in collective-bargaining negotiations to modify and renew the existing bargaining agreement. In the course of those sessions the Respondent presented proposals which included, *inter alia,* a general raise of 5-cent an hour, paid vacations of 2 weeks after 8 instead of 10 years, an increase in sick leave payments from $20 to $25 per week, and payment of a 20-cent night shift differential. However, on and after July 29, the Respondent would not agree to a contract for longer than 1 week after August 8. The Union subsequently was willing to accept the Respondent's offer of the above increases for a 1-year contract, but the Respondent declined on the ground that this would prevent an election and offered instead a day-to-day agreement.

As noted above, the original contract expired on August 8 and the Respondent filed a petition for an election on August 9. On August 12, the Respondent, in a speech to the employees, announced that the increases offered during the negotiations would become effective as of August 9, including the added 5-cents an hour for all employees and increased sick benefits of $25 per week. On August 23, the Respondent posted a notice informing its employees that all would get an additional increase of 20-cents per hour effective as of August 19. And on

September 1, another notice announced that all employees with 15 years of service would receive an additional 1-week paid vacation, making the maximum vacation 3 weeks instead of 2 weeks as previously.

The complaint alleges that by the above course of conduct, i.e., by refusing to offer the Union a contract of longer duration and by unilaterally granting the increased wages and benefits in August and September, the Respondent violated Section 8(a)(5) and (1) of the Act. The Trial Examiner recommended that the complaint be dismissed because he concluded that although none of the considerations[1] cited by the Respondent was alone sufficient to afford a reasonable basis for the asserted doubt as to the Union's continued majority status, the "whole congeries of facts" provided sufficient grounds therefor. Accordingly, as he also concluded that, "[a]ll the while it insistently preserved this position, Respondent met with the Union and bargained in good faith[,]" the Trial Examiner recommended that the complaint be dismissed.

We conclude that the Trial Examiner's finding that the Respondent bargained in good faith is clearly erroneous. In our judgment, even if it were to be found that the "whole congeries of facts * * * provided Respondent with sufficient grounds to conclude that the Union's majority by the spring of 1966 was very dubious indeed [,]" the record nevertheless supports a finding that the Respondent did not assert such doubt in good faith.

It is, of course, well settled that after the first year of a certification there is a presumption of continued ma-

[1] The factors relied on by the Respondent are: The Union's narrow election victory in 1963; lack of widespread employee support for the 1963 strike; Union bulletins circulated to the employees in 1966 urging more employee support of the Union; and the fact that checkoff authorizations never exceeded 30 percent of the unit.

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jority status, which is, however, rebuttable by an affirmative showing to the contrary.[2] "A direct corollary of this proposition is that after the certificate is a year old, * * * the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith.*" (*Celanese Corporation of America, supra.*) Clearly, the Respondent's evidence herein did not affirmatively rebut the continuing presumption of majority status flowing from the certification. At most, it may have furnished a basis for doubt that the Union had retained its majority status since the certification issued. But this alone would not justify a refusal to bargain under the *Celanese* rule, for the question would still remain whether the assertion of doubt was in good or bad faith.

The answer to that question does not, however, turn solely on whether there existed a reasonable ground for such doubt, although that is a crucial element. It turns also on whether or not the employer raised the majority issue for the purpose of causing employee disaffection from the union or seeking to gain time in which to undermine the Union.[3]

On the basis of the entire record in this case, we are satisfied that the Respondent did not question the Union's majority in good faith. In the first place, had the Respondent believed the grounds which it asserts caused it to doubt the Union's majority were reasonable grounds for such doubt, and desired for that reason an expression of the employees untrammelled choice before extending its bargaining relationship with the Union, its more natural course of action would have been to file its RM peti-

[2] *Celanese Corporation of America*, 95 NLRB 664, 672.

[3] *Celanese Corporation of America, supra,* at 673; *C & C Plywood Corporation and Veneers, Inc.*, 163 NLRB No. 136.

tion at the time the Union demanded bargaining for a new agreement.[4] That it did not do; rather, it entered into negotiations with the Union during the initial stages of which it gave no indication that a successfully negotiated contract would not govern their relations for a normal period. In this respect its conduct, despite its pronouncement, was contrary to the existence of the alleged doubt. It was not until relatively late in the negotiations, and after the Union gave indication that it was moving closer to acceptance of the Respondent's contract proposals, that the Respondent injected that "one week" and "day-to-day" limitation on any contract's duration, limitations obviously not calculated to gain acceptance.

Though the Respondent contends that the purpose of these severe limitations on the duration of any agreement that might be reached was to permit the holding of an election to resolve the alleged question concerning representation, the Respondent's subsequent course of conduct reveals that the Respondent's negotiating stand was part of a calculated plan designed to impress upon the unit employees that they could gain more through voluntary action of the Respondent than through representation by the Union. Thus, shortly after filing its representation petition and while it was still pending, the Respondent, acting unilaterally, not only put into effect without restriction the 5-cent wage increase and added sickness and accident benefits that had been offered the Union for a 1-week contract, but also gave an additional 20-cents wage increase, four times that which it had offered the Union,

[4] Contrary to the Trial Examiner's statement in his footnote 14, the Respondent would not have been precluded from filing a petition which was timely with respect to the 60-day insulated period, subject to the usual requirements for an otherwise timely employer petition. The cases cited by him preclude an employer's petition during that portion of a contract term which would be unreasonably long and hence would not bar a rival petition.

and an improved vacation plan as well. The unilateral granting of these added wages and benefits, apart from being entirely inconsistent with its responsibility to continue to bargain in good faith until the Board determined whether to process the petition,[5] was, we find, clearly coercive in purpose and effect[6], precluding the conduct of a fair election at which employees could express their untrammelled choice. It is the antithesis of good faith to insist upon the right to test a union's majority in an election and then to obstruct the election processes by unilaterally granting increases in benefits which can only foreclose the possibility of a fair election being held.

On the basis of the foregoing, we find that the Respondent did not question the Union's majority in good faith, and that by withdrawing recognition from the Union; and by unilaterally granting wage increases and improved sick benefits and vacations, the Respondent bargained in bad faith with the Union in violation of Section 8(a)(5) and (1) of the Act.[7]

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action to effectuate the policies of the National Labor Relations Act.

We have found that the Respondent violated 8(a)(5) and (1) of the Act by refusing to bargain in good faith

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[5] *Ray Brooks v. N.L.R.B.*, 348 U.S. 98, 103.

[6] That such conduct constituted independent violations of Section 8(a)(1) of the Act whatever the merits of the Respondent's claim that it had a bona fide doubt of the Union's majoirty, is not open to question. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405.

[7] Member Brown concurs because, in the circumstances of this case, the Respondent has not demonstrated adequate basis for rebutting the Union's representative status.

with the duly certified bargaining agent of its employees at its plant in Bally, Pennsylvania. Consequently, we shall order the Respondent to bargain upon request with the Union and to cease and desist from any like or related unfair labor practices in the future.

CONCLUSIONS OF LAW

1. Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, has been, and now is, the exclusive bargaining representative of Respondent's employees in the certified appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

2. The Respondent has engaged and is engaging in conduct violative of Section 8(a)(5) and (1) of the Act on and after May 18, 1966, by (a) unilaterally granting substantial improvements in wages and other conditions of employment; and (b) withdrawing recognition from Local 2130 as the exclusive representative of its employees in the appropriate bargaining unit on and after August 8, 1966.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bally Case and Cooler, Inc., Bally, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Upon request, refusing to bargain collectively with Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all

employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

(b) Making any changes with respect to rates of pay, wages, or other conditions of employment of its employees in the appropriate bargaining unit described below without prior consultation or bargaining with Local 2130; failing to recognize and bargain with the Union; provided, however, that nothing herein shall be construed to require the Respondent to rescind or discontinue new wage rates or other benefits previously granted.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively with Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if any understanding is reached, em-

body such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of the Employer at its Bally, Pennsylvania factory, including shop clerical employees; but excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act.

(b) Post at its plant in Bally, Pennsylvania, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 4 shall after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. Jul 10 1968.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
(Seal) *National Labor Relations Board*

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not refuse, upon request, to bargain collectively with Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

We Will Not make any changes with respect to rates of pay, wages, hours of employment, or other conditions of employment of our employees in the appropriate bargaining unit described below without prior consultation or bargaining with Local 2130, International Brotherhood of Electrical Workers, AFL-CIO; provided, however, that nothing herein shall be construed to prevent, or is intended to prevent, our continuing in effect new rates of pay, wages or other benefits previously given to you.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named labor organization or any other labor organization, to bargain collectively through representatives of their choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as

authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

We Will bargain collectively upon request, with the above-named labor organization as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees of the Employer at its Bally, Pennsylvania, factory including shop clerical employees, but excluding office clerical employees, guards, professional employees, and supervisors, as defined in the Act.

BALLY CASE AND COOLER, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut & Juniper Sts., Philadelphia, Pa., 19107 Telephone 597-7601.

MOTION FOR RE-CONSIDERATION AND REQUEST FOR FULL BOARD REVIEW.

(Filed August 31, 1968.)

Comes now Bally Case & Cooler, Inc., respondent herein, and moves for reconsideration of the decision and order issued herein on July 10, 1968, which in effect reversed the decision of Trial Examiner, Robert E. Mullen, in all substantive matters, for the reasons, among others, as follows:

1. That the decision of the Board is inconsistent with the public declarations of respect to be accorded Trial Examiners' decisions, particularly on evaluation of factual evidence.

2. That the reasons advanced for reversing the decision of the Trial Examiner are self-contradictory and inconsistent with precedents and doctrine which the Board has urged employers to follow and induced lawyers to respect as guidelines in counselling on the subject of collective bargaining.

3. That the decision of the Trial Examiner was reversed upon a post rationalization of circumstances not germane to the litigated issues and involving substantive matters beyond the scope of the responsibility of the Board.

4. That the decision is inconsistent with the authorities relied upon by the Board to reverse the well-reasoned decision of the Trial Examiner.

5. That the remedies suggested in light of the time elapsed in unrealistic and inconsistent with the spirit and purposes of the Act.

6. That the conclusions of law are inconsistent with the precedents of the Board and are contrary to fact.

7. That the order issued in a nature of cease and desist, by its very nature would require the employer to violate the law, the established precedents regarding such matters, and the decisions of the United States Supreme Court.

8. That the order, in effect, denies the guaranty of free choice to the employees provided by the Act, and substitutes a misapplication of doctrine in furtherance of the institutional force of a union while derogating the rights of individuals as employees.

It is not without awareness of the overwhelming, if not insuperable odds, that confront us in the presentation of a motion for reconsideration that we make our plea.

However, it is believed that the participating Board members, under heavy pressures of the mounting case load, may well, upon re-examination, take a different view of the case.

In this connection, we believe that the carefully prepared, well reasoned analysis of the case by the Trial Examiner should be reconsidered. Moreover, we believe that the panel has applied, perhaps inadvertently, a wholly mechanistic approach to surface facts. This would be the almost inevitable consequence of reviewing a report of the events without the benefit of the transcript, or better still firsthand observation of the testimony.

We earnestly request that an opportunity for oral argument be granted, and if possible, before the full Board.

WHEREAS, because of the erroneous evaluation of the facts and reliance upon references to cases inapposite with the instant matter, and for the reasons abundantly supported by appropriate law, and supported by the Trial Examiner's Decision it is urged that the complaint be dis-

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missed in accordance with the findings and conclusions of the Trial Examiner.

Respectfully submitted,

BALLY CASE & COOLER, INC.,
Bally, Pennsylvania,
By: C. A. KOTHE,
Attorney.

KOTHE, EAGLETON & HALL,
Suite 204 Philtower Bldg.,
Tulsa, Oklahoma 74103.

ORDER DENYING MOTION.

(Entered August 15, 1968.)

On July 10, 1968, a three-member panel of the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which, reversing the Trial Examiner, it found that the Respondent has engaged in certain conduct violative of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. The Board ordered the Respondent to take certain action to remedy such unfair labor practices.

Thereafter, on July 31, 1968, the Respondent filed a "Motion for Reconsideration and Request for Full Board Review" of the Decision and Order, urging that the Complaint be dismissed in accordance with the findings and conclusions of the Trial Examiner. Respondent also requested "that an opportunity for oral argument be granted, and if possible, before the full Board."

The same three-member panel which decided the case on July 10, 1968, having duly considered the matter,

[1] 172 NLRB No. 106.

IT IS HEREBY ORDERED that the Respondent's request for oral argument be, and it hereby is, denied.

IT IS FURTHER ORDERED that the motion for reconsideration by the full Board be, and it hereby is, denied. See *Enterprise Industrial Piping Company*, 118 NLRB 1.

IT IS FURTHER ORDERED that the motion for reconsideration be, and it hereby is, denied on the ground that it contains nothing not previously considered by the Board.

Dated, Washington, D. C., August 15, 1968.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

No. 18,937

United States Court of Appeals

FOR THE SIXTH CIRCUIT

BALLY CASE AND COOLER, INC., OF DELAWARE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 2130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Intervener.

ORDER

Before: McCREE and COMBS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, the petition for rehearing is denied.

Entered by order of the Court:

/s/ Carl W. Reuss
Clerk

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1969

BALLY CASE AND COOLER, INC., OF DELAWARE
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 14, 1970.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 9th day of March, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1570

BALLY CASE AND COOLER, INC., OF DELAWARE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A10) is reported at 416 F. 2d 902. The Board's decision and order (202a-211a)[1] are reported at 172 NLRB No. 106.

[1] "R." references are to the joint appendix filed by the parties in the court below.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1969, and a petition for rehearing was denied on December 15, 1969. On March 9, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including May 14, 1970, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether as a remedy for the employer's unlawful refusal to bargain, the Board could properly order the employer to cease its unlawful conduct, to bargain collectively with the union, and to embody any agreement reached in writing.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. A1-A2 of the Appendix to the petition.

STATEMENT

A. The Board's Findings of Fact

In February 1963, Local 2130, International Brotherhood of Electrical Workers, AFL-CIO, was certified as the bargaining representative of the production and maintenance employees at petitioner's Bally, Pennsylvania, plant, following a Board-conducted election (R. 202a). In August 1963, following

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an economic strike, the Union and the Company executed a bargaining contract effective until August 8, 1966 (*ibid.*).

By letter of May 11, 1966, the Union notified the Company of its desire to amend the 1963 agreement (R. 202a). The Company responded by letter of May 18 in which it expressed doubt that the Union continued to have majority support in the unit, gave notice of its desire to terminate the agreement as of the anniversary date, announced that it would file a representation petition "at the appropriate time," and requested the Union to join in a stipulation for an election. In the meantime, the Company agreed to meet with the Union and "discuss in good faith any subjects that you deem to be relevant" (*ibid.*). Bargaining sessions were held on June 17, July 1, July 28, July 29, and August 8, 1966 (R. 203a). On July 29, the Company presented a written proposal setting forth increased economic benefits which it was willing to include in a new contract (R. 203a). The proposed benefits included, *inter alia*, a general wage increase of 5 cents per hour, and paid vacations of two weeks after eight, instead of ten, years (R. 203a, 137a-139a). When the Union representative asked about the duration of the proposed agreement, the Company replied that, because it doubted the Union's majority status and would seek an election, it would not agree to a contract of more than one week's duration after August 8—so that the new agreement would not act as a bar to an election (R. 203a). The Union rejected the proposal and the membership authorized a strike. However, at the final bargaining session on August 8,

the Union offered to accept the Company's contract proposal if the Company would agree to a one-year duration period. The Company rejected the Union's offer and reiterated its alleged doubts as to the Union's majority status. The Company added that, since it planned to file a petition for an election on the following day, it could offer a contract on a day-to-day basis only. The following day, the Company filed a petition for an election with the Board's Regional office (R. 193a).

On August 12, a Company attorney addressed the assembled Company employees and informed them that the collective agreement had expired and that the Company had filed an election petition. He also told them that the benefits that the Company had offered in its July 29 proposal (*supra*, p. 3) would be put into effect retroactive to August 9 (R. 194a).

On August 23, the Company posted a notice on the plant bulletin board that all employees would get an additional wage increase of 20 cents per hour effective August 19 (R. 203a). On September 1, the Company posted another notice announcing that all employees with 15 years service would receive a three-week paid vacation (*ibid.*). The Union was not consulted prior to either notice (R. 124a-125a; 10a-11a).

B. The Decisions Below

The Board, in disagreement with its Trial Examiner, held that the Company had not questioned the Union's majority in good faith, and that, by withdrawing recognition from the Union on and after August 8, 1966, and by unilaterally granting substan-

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tial improvements in wages and other conditions of employment, it had violated Section 8(a)(5) and (1) of the Act (R. 206a-207a). Thus, the Board found that:

> had the [Company] believed the grounds which it asserts caused it to doubt the Union's majority were reasonable grounds for such doubt, and desired for that reason an expression of the employees untrammelled choice before extending its bargaining relationship with the Union, its more natural course of action would have been to file its RM petition at the time the Union demanded bargaining for a new agreement. That it did not do; rather, it entered into negotiations with the Union during the initial stages of which it gave no indication that a successfully negotiated contract would not govern their relations for a normal period. In this respect its conduct, despite its pronouncement, was contrary to the existence of the alleged doubt. It was not until relatively late in the negotiations, and after the Union gave indication that it was moving closer to acceptance of the [Company's] contract proposals, that [it] injected that "one week" and "day-to-day" limitation on any contract's duration * * *. [R. 205a.]

The Board further found that:

> Though the [Company] contends that the purpose of these severe limitations on the duration of any agreement that might be reached was to permit the holding of an election to resolve the alleged question concerning representation, the [Company's] subsequent course of conduct [in making unilateral changes in employment

> conditions] reveals that the [Company's] negotiating stand was part of a calculated plan designed to impress upon the unit employees that they could gain more through voluntary action of the [Company] than through representation by the Union. * * * [R. 206a.]

The Board ordered the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to incorporate any agreement reached in a written agreement (R. 208a-209a).

The court of appeals enforced the Board's order in full (Pet. App. A3-A10). It pointed out (Pet. App. A7): "The decisive issue here is whether the actions of the company were taken under a reasonably based doubt asserted in good faith"; and concluded (Pet. App. A9): "we are of the opinion that the Board could reasonably infer from this pattern of conduct that the company did not in good faith seek to test the union majority in a fair election, but rather sought to stifle the union."

ARGUMENT

The issue raised by petitioner (Pet. 2)—"whether * * * [the Board] can by indirection, order a party to agree to a substantive provision of a collective bargaining agreement"—is not presented in this case. As shown (*supra*, pp. 5-6), the Board found that the Company had no good faith doubt of the Union's continued majority status and its insistence on a "day-to-day" contract was not—as it claimed—based on a desire to permit the holding of an election, but rather

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was part of its overall scheme to undermine the Union in the eyes of the employees. Contrary to petitioner's assumption (Pet. 10), the Board's order does not require the Company to agree to the one-year duration clause urged by the Union, or any other particular clause. It only requires the Company to cease and desist from insisting on a short-term contract in "bad faith," to bargain in good faith with the Union, and to embody any agreement reached, if there be one, in writing (*supra*, p. 6). Such an order is clearly an appropriate remedy for the Company's unlawful refusal to bargain.

The order here is thus totally dissimilar from that invalidated in *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, which specifically required the employer to grant the union a checkoff provision even though it had not agreed to such a provision in collective bargaining. Nor is the decision here inconsistent with *National Labor Relations Board* v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524 (C.A. 9 (Pet. 11-12). There, the court, while holding that it "is not *per se* indicative of bad faith to refuse to accept a contract having a duration [less than] the certification year," [2] recognized that in "light of other conduct and circumstances [a limited duration clause could be] evidence which, along with other evidence, justified an inference of bad faith." *Id.* at 529. The latter was the situation here.

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[2] In *Yutana*, the employer sought a duration clause limited to one operating season (315 F. 2d at 529).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1970.

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